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No.....
IN THE

Supreme Court of the United States

October Term, 1980

M.G.R.S., INC.,

Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

PETITION FOR CERTIORARI.

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PETITION FOR CERTIORARI.

Questions Presented for Review.

Petitioner M.G.R.S., Inc. operated a passenger vessel between the Port of Los Angeles and Santa Catalina Island over 20 miles of high seas beyond the three-mile limit from either shore.

Sections 6368 and 6368.1 of the California Revenue and Taxation Code exempt from the state sales and use tax "watercraft for use in interstate or foreign commerce," and the state statutes nowhere define that term.

On Petitioner's civil action for refund of taxes paid under protest, the trial court found that this vessel was therefore exempt from tax, but the California appellate courts reversed.

This petition presents the following questions:

1. Can California deny that this transportation between two points in California but traversing 20 miles of high seas outside California is "interstate or foreign commerce," in the face of this Court's holding to the contrary in *Lord v. Steamship Company*[1] and subsequent cases?

2. Can California extend its boundaries beyond both the federal and state boundaries established by this Court in *United States v. California*,[2] so as to define this transportation as not being "interstate or foreign commerce?"

3. Can California deny that this vessel, which carries pre-paid passengers from other states and foreign countries, is engaged in "interstate or foreign commerce" as defined by this Court in *The Daniel Ball*,[3] merely because these passengers constitute a minority of passengers on a minority of voyages?

Parties to the Proceeding Below.

All parties to the proceeding in the California Supreme Court are included in the caption of the case in this Court.

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[1]102 U.S. 541 (1880).
[2]381 U.S. 139 (1965).
[3]10 Wall. 557 (1881).

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Reports of Opinions Below.

The opinions of the courts and of the administrative agency below are not published in any official or unofficial reports. (The extended opinion of the California court of appeal was not certified for publication despite requests by both respondent California State Board of Equalization and petitioner M.G.R.S., Inc. that it be so published, because this case will set precedent for a number of pending actions as well as future cases.)

All opinions below are set forth in the Appendix hereto.

Also relevant to a determination of this Petition is the officially reported opinion in *People v. Weeren*, 26 Cal.3d 654 (1980), in which the California Supreme Court officially published certain of the rulings sought to be reviewed here. *Weeren* is the subject of a separate petition for certiorari now pending before this Court as Docket No. 79-1978.

Grounds on Which Jurisdiction Is Invoked.

The California Supreme Court filed and entered its decree denying hearing to petitioner M.G.R.S., Inc. on April 30, 1980. Jurisdiction is conferred upon this Court by Title 28, United States Code, sections 1257(3) and 2101(c), as interpreted and carried forward by this Court in its Rule 17.1(b) and (c) and its Rule 20.2, respectively.

The California Supreme Court decree denies hearing on petition to review the California court of appeal decision reversing the trial court, which court of appeal decision defines the term "interstate or foreign commerce"—a term which is federal by any definition, and a term of federal Constitutional significance (see, *e.g.*, Frankfurter for the Court in *Central Greyhound Lines v. Mealy*, 334 U.S. 653 (1948), quoted *infra* at 13-14)—in a way in conflict with the decisions of this Court and the consistent decisions of federal courts of appeals, including:

— *Lord v. Steamship Company*, 102 U.S. 541 (1880): Transportation between two points in the same state but traversing any territory outside that state is "interstate or foreign commerce." Accord: *Cornell Steamboat Company v. United States*, 321 U.S. 634 (1944).

— *United States v. California*, 381 U.S. 139 (1965): The seaward boundary of California for all purposes is a three-mile belt off the coast and a separate three-mile belt around each offshore island, and California cannot extend that boundary for any purpose. But see: *People v. Weeren*, 26 Cal.3d 654 (1980), which so extends that boundary.

— *The Daniel Ball*, 10 Wall. 557 (1871): Where passengers moving in interstate commerce are transported as part of that interstate journey by a carrier, even though wholly within one state, that carrier engages in interstate commerce. Accord: *Southerland v. St. Croix Taxicab Association*, 315 F.2d 264 (3d Cir. 1953).

Constitutional Provisions, Statutes, and Regulations Involved.

The principal constitutional provisions, statutes, and regulations involved in this case are set forth verbatim at this point. All other provisions referred to by Petitioner are cited in the Table of Authorities above.

United States Constitution, Article I, Section 8, clause 3:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

United States Constitution, Article VI, clause 2:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Many federal statutes defining "interstate or foreign commerce"; for example, Title 49, *United States Code*, section 1301(24):

"The carriage by aircraft of persons or property as a common carrier for compensation or hire . . . between places in the same State of the United States through the airspace over any place outside thereof. . . ."

California *Revenue and Taxation Code*, sections 6368 and 6368.1:

"§6368. Watercraft for interstate or foreign commerce.

"(a) There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this state of watercraft for use in interstate or foreign commerce involving the transportation of property or persons for hire or for use in commercial deep sea fishing operations outside the territorial waters of this state by persons who are regularly engaged in commercial deep sea fishing, and any sales of tangible personal property becoming a component part of such watercraft in the course of constructing, repairing, cleaning, altering, or improving the same, and charges made for labor and services rendered in respect to such constructing, repairing, cleaning, altering, or improving. . . ."

"§6368.1 Watercraft used in commercial deep sea fishing; receipt from sale or lease

"(a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of and the

storage, use, or other consumption in this state of watercraft which are leased, or are sold to persons for the purpose of leasing, to lessees using such watercraft in interstate and foreign commerce involving the transportation of property of persons for hire or for use in commercial deep sea fishing operations outside the territorial water of this state by persons who are regularly engaged in commercial deep sea fishing, and any sales of tangible personal property becoming a component part of such watercraft in the court of constructing, repairing, cleaning, altering, or improving the same, and charges made for labor and services rendered in respect to such constructing, repairing, cleaning, altering, or improving. . . ."

California *Administrative Code*, Title 18 (Board of Equalization regulations), section 1594:

"1594. Watercraft.

"(a) General Exemptions. Tax does not apply to the sale of nor to the storage, use, or other consumption of watercraft which are used, leased to a lessee for use, or sold to persons for leasing to lessees for use for any of the following purposes:

"(1) Use in interstate or foreign commerce involving the transportation of persons or property for hire, even though the watercraft operates between termini within the state, such as ferry boats operating entirely within the state but transporting interstate passengers or cargo and barges or tugs that operate entirely within the state convoying or aiding the departure or arrival of vessels to or from points outside the state."

STATEMENT OF THE CASE.

Factual Background.

Petitioner M.G.R.S., Inc., ("MGRS") leased and operated the S.S. Catalina at all material times exclusively in

the transportation of passengers and their baggage for hire between the Port of the City of Los Angeles on the California mainland and the harbor of the City of Avalon on Santa Catalina Island, a distance of 26 miles over the ocean. (Stipulation of Facts, CT 9-15, Pars. 5 and 6.[4]

A number of the S.S. Catalina passengers (identified in the Stipulation only as a minority of total passengers on a minority of voyages) were part of out-of-state pre-paid group package tours which originated from locations as diverse as New York City; Vancouver, British Columbia; Houston, Texas; and Sonora, Mexico. (Stipulation, Par. 6.) No information was presented as to the various in-state or out-of-state points of origin of persons and families travelling independent of group package tours.

Respondent California State Board of Equalization ("Board") and the California appellate courts placed great weight upon the additional fact—deemed irrelevant by MGRS (see pp. *infra*)—that the operation of the S.S. Catalina was regulated by the California Public Utilities Commission. (Stipulation, Par. 5.)

At all material times, California Revenue and Taxation Code sections 6368 and 6368.1 provided, and do now provide, an exemption from the state sales and use tax for "watercraft for use in interstate or foreign commerce involving the the transportation of property or persons for hire" and for "watercraft which are leased, or are sold to persons for the purpose of leasing, to lessees using such watercraft in interstate and foreign commerce involving the transportation of property or persons for hire."

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[4]This case was presented to the trial court on a written Stipulation of Facts. References to "CT" are to the Clerk's Transcript in the California appellate courts.

During the entire audit period (1963 through 1970), MGRS did not have a permit from nor an account number with the Board and made no payments under the provisions of the California Sales and Use Tax Law with respect to bareboat charter lease payments on the S.S. Catalina, or for the purchase of parts and materials in the repair and maintenance of the vessel, or for charges for labor or services rendered in respect thereto. MGRS purchased the tangible property ex-tax by furnishing its vendors with a watercraft exemption certificate at the time of sale. (Stipulation, Pars. 4, 7, and 8.)

In January 1971—eight years after the audit period began—the Board first asserted claims against MGRS for sales and use tax liability for lease payments, purchase of parts and materials, and charges for labor and services, all in connection with the operation of the S.S. Catalina between Los Angeles and Catalina Island from 1963 through 1970. (Stipulation, Par. 9.)

Proceedings Below.

The Board conducted an audit of MGRS and, after MGRS timely filed all claims and protests required by law, assessed tax based upon its conclusion "that the movement of passengers and property by vessel from the California mainland to Santa Catalina Island and vice versa is not interstate or foreign commerce. . . ." MGRS timely paid the tax under protest; filed claim for refund; and, upon denial of such claim, filed this suit. (CT 12.)

The case was tried on written Stipulation of Facts (CT 9-15) and on written briefs (CT 16-71) and oral argument.

On November 14, 1978, the trial court entered judgment in favor of MGRS. (CT 97.) Findings of Fact and Conclusions of Law were duly waived by the parties in writing.

deeming the Stipulation of Facts and the court's minute order to be used as findings and conclusions. (CT 92.)

The Board appealed from the judgment, challenging the trial court's determination that the operation of the S.S. Catalina by MGRS "is a use of the vessel in interstate and/or foreign commerce as used in Revenue and Taxation Code Sections 6368 and 6368.1." (CT 98.)

The court of Appeal reversed, and the California Supreme Court denied MGRS's petition for hearing.

Federal Question Raised.

The federal question here presented for review was first raised in the trial court in MGRS's Complaint, in which MGRS alleged:

> "At all times mentioned herein, plaintiff was and presently is engaged in interstate or foreign commerce in the transportation of passengers and their baggage for hire by vessel between the Port of Los Angeles and the City of Avalon on Catalina Island. . . ." (Par. 4; CT 2.)

and:

> "Defendant's [Board's] interpretation [of 'interstate or foreign commerce'] is in direct derogation of the statutes of the United States Government and the State of California and cases of competent jurisdiction interpreting the same." (Par. 14; CT 4.)

The preservation and articulation of this federal question throughout the state court proceedings are detailed in the Appendix.

ARGUMENT.

Petitioner MGRS seeks hearing before this Court because the California Supreme Court continues to treat international waters as its own territory in the face of explicit direction from this Court to the contrary. (*United States v. California*, 381 U.S. 139 (1965).)

It is necessary now for this Court to direct the California courts to recognize the established seaward boundary of the State of California (and therefore of the United States) for all purposes, and to put a stop to the California courts' practice of redefining terms of federal Constitutional significance whenever it suits the state's peculiar interests.

I.

The California Courts Have Here Held That Transportation Between Two Points in the Same State but Traversing High Seas Outside That State Is Not "Interstate or Foreign Commerce," Contrary to Consistent Decisions of This Court.

As early as 1880 the United States Supreme Court determined that transportation between points in California but over points on the high seas constituted foreign comerce. In *Lord v. Steamship Company* (also cited as *Lord v. Goodall, etc.*), 102 U.S. 541 (1880), this Court considered the case of the steamship "Ventura" which was engaged solely in the transportation of goods and passengers between San Francisco and San Diego. She neither took on nor put off goods outside of the State of California, but in making her voyages she ran a distance of 480 miles on the Pacific Ocean.

This Court held that Congress has the power to regulate commerce with foreign nations and among the several States (U.S. Const., Art. I, sec. 8), but that it has nothing to do

with the purely internal commerce of the states. In applying that principle, this Court concluded that contracts to carry goods from San Francisco to San Diego by sea could not be performed except by going not only out of California, but out of the United States as well. The Court recognized that the Pacific Ocean belonged to no one nation, and that when the "Ventura" went out from San Francisco to San Diego on her voyages she entered on a navigation which was necessarily connected with other nations. Although the "Ventura" was not trading with those nations, she was navigating with them.

> "In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress." 102 U.S. at 544.

The holding of the United States Supreme Court in the *Lord* case—that a voyage between San Francisco and San Diego is interstate or foreign commerce so as to subject the vessel to federal regulation—is alone sufficient to control the issue presented in this case. If that coastal voyage is interstate or foreign commerce, then the voyage of the S.S. Catalina between the mainland and Santa Catalina Island which *necessitates* travel beyond California waters is *a fortiori* interstate or foreign commerce.

But the California appellate courts held just the opposite.

The state courts here committed dangerous error in finding that the *Lord* case "was expressly rejected and repudiated and the case expressly disapproved . . . in both the state Supreme Court and the United States Supreme Court opinions in the later case of *Wilmington T. Co. v. Railroad Commission* (1913) 166 Cal. 741, and in *Wilmington Transportation Company v. Railroad Commission of California* (1915) 236 U.S. 151 . . ." (Court of appeal opinion

("Opinion") at page 6; Appendix page 7.) MGRS submits that the supreme court of the State of California could not expressly (or otherwise) reject, repudiate, or disapprove a decision of the United States Supreme Court.[5]

Moreover, contrary to the appellate court's statement, the Supreme Court of the United States did not in fact reject, repudiate, or disapprove the *Lord* case. The only reference to the *Lord* case in *Wilmington Transportation Company v. Railroad Commission of California, supra,* 236 U.S. 151, appears at page 153, where this Court said:

> "Relying upon Lord v. Goodall, N.&P.S.S. Co., 102 U.S. 541, 26 L.Ed. 224, the plaintiff in error contends that transportation over the high seas is 'commerce with foreign nations' in the constitutional sense. (Citing cases.) But if it be *assumed for the present purpose that the power of Congress extends to the subject of this controversy* [that is, the subject *is* interstate or foreign commerce], the fact remains that the power has not been exercised."

This is the only reference by the United States Supreme Court to the *Lord* case in *Wilmington*. The United States Supreme Court did not reject or repudiate or disapprove the *Lord* case, "expressly" or otherwise.

Nor was *Lord* "renounced" by the United States Supreme Court in *Lehigh Valley Railroad Co. v. Commonwealth of Pennsylvania,* 145 U.S. 192 (1891), or in *Ex parte Garnett,* 141 U.S. 1 (1891), as stated in the Opinion at page 6.

In fact, the Supreme Court in the *Lehigh Valley* case again stated of the vessel involved in *Lord*, "In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and, as such, she and the

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[5]But it is precisely that attitude that causes MGRS to now present this petition.

business in which she was engaged were subject to the regulating power of Congress." The *Lehigh Valley* Court did not criticize, reject, or denounce the findings in the *Lord* case. *Lehigh Valley* simply said that it was unnecessary to invoke the power to regulate commerce in order to find that the maritime law would apply to this particular operation. (145 U.S. at 203.) *Ex parte Garnett, supra*, 141 U.S. 1, is to the same effect.

Indeed, the principle of the *Lord* case is corroborated by consistent federal authority.

In *Cornell Steamboat Company v. United States*, 321 U.S. 634 (1944), the United States Supreme Court applied the principle of the *Lord* case, involving foreign commerce, to circumstances involving interstate commerce. This Court there held that where a carrier by water hauls from one point in New York to another point in New York through New Jersey waters, the carrier was engaged in transportation by water from a place in a state to a place in another state within the meaning and coverage of the Interstate Commerce Act. *This, notwithstanding the fact that the vessels never touched the New Jersey shore.*

In flights by air, where the origin and destination are in the same state, federal trial courts have consistently held the flights to be interstate or foreign commerce. In *Civil Aeronautics Board v. Island Air Lines, Inc.*, 235 F.Supp. 990 (D. Haw. 1954), it was held that flights between the islands of the state of Hawaii were over points on the high seas and therefore constituted interstate or foreign commerce. Finally, and closest to home is the case of *United Air Lines, Inc. v. Public Utilities Commission of California*, 109 F.Supp. 13 (S.D. Cal. 1952), reversed on procedural grounds, 346 U.S. 402. There, the federal court held that since flights between Los Angeles International Airport and Santa Catalina Island were over waters (high seas) outside

the State of California, the flights were under the jurisdiction of the federal Civil Aeronautics Board. Although the case was reversed in the United States Supreme Court on procedural grounds, the finding that the flights were properly regulated by the federal government as interstate or foreign commerce was not overruled.

In each of these cases, the fact that the vessels or airplanes in transportation made no stops while outside the state was irrelevant in the determination of interstate or foreign commerce. Equally irrelevant was the fact (argued by the court of appeal without authority, Opinion at 6, 7, 12) that the vessels or airplanes did not enter the waters or air space of any other state or nation.

It is this long-standing and consistent body of federal law that California now challenges in the bald statement (Opinion at page 9) that "The cases do not hold that all else beyond the territorial waters of California is necessarily interstate or foreign commerce. . . ."

This is plain, dangerous, and defiant error. Nor does the California court's rationale in any way explain or excuse its challenges to the federal rule of law in this regard. The state courts "explain":

> "The state here has simply legitimately imposed a use tax not upon an interstate commercial activity but on the property or use thereof by a local corporation doing an entirely local business out of one local point in California where it has its principal place of business, San Pedro, and where that business involves no more than going to another point within the same county and state." (Opinion at 10.)

This proffered rationale seems to be based upon two equally unsound theories: That the tax is "legitimate," in the sense of constitutionally permissible; and, That the

transportation is "local," as though that meant it could not be "interstate or foreign."

MGRS has never challenged the ability of California to enact a hypothetical statute taxing its operations. But the fact is that the California legislature has chosen to exempt vessels in "interstate or foreign commerce," and having made that choice it must abide by the meaning of that federal phrase.

On page 4 of the Opinion, the court of appeal erroneously states: "The issue before us does not involve any question of the authority of the state or of Congress to regulate or otherwise legislate concerning respondent's activity." The *authority of Congress* to regulate the Catalina voyage *is* precisely the issue, because Congressional *authority* to regulate is the meaning of "interstate or foreign commerce." Whether Congress has *chosen* to *exercise* that power is *not* relevant, because the fact of regulation does not make commerce interstate but rather the interstate character permits such regulation. See *Wilmington Transportation Co. v. California Railroad Commission, supra,* 236 U.S. 151, seriously misinterpreted by the state court (Opinion at 7-9), holding transportation from Los Angeles to Catalina is interstate or foreign but could be regulated by the state if Congress and the Interstate Commerce Commission chose not to regulate it.

Equally in conflict with this Court's ruling, but perhaps even more dangerous, is the state courts' confusion of local vs. national commerce with intrastate vs. interstate commerce.

The fact that this transportation may be local rather than national in scope does not affect its "interstate or foreign" character. To attempt to call transportation that is clearly interstate or foreign commerce by some other name is to

commit the same error that was so severely criticized by Justice Frankfurter, speaking for the Court, in *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948):

> "But to label transportation across an interstate stream 'local commerce' for some purposes when it is 'interstate commerce' in other relations, see, e.g., *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, is to use loosely terms having conotations of constitutional significance. To call commerce in fact interstate 'local commerce' because under a given set of circumstances, as in the Lehigh Valley case, a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction. Especially in the disposition of constitutional issues are legal fictions hazardous, because of the risk of confounding users and not merely readers. The kind of confusion to which the Lehigh Valley opinion has given rise results from employing a needless fiction—calling commerce local which in fact is interstate—as a manner of stating that a particular exercise of State power is not invalid even though it affects interstate commerce. The difficult task of determining whether a phase of commerce, concededly interstate, is subject to a particular incidence of State regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control. To state this persistent and protean problem of our federalism in the form of a question-begging fiction, is not to answer it." (334 U.S. at 659-660.)

Transportation between the mainland and Santa Catalina Island is in interstate or foreign commerce—for all purposes.

II.

The California Courts Have Here and Elsewhere Extended the State's Boundaries Beyond Both the Federal and State Boundaries Established by This Court in United States v. California.

The transportation in this case traverses 20 miles of international high seas beyond the three-mile limit from either

shore. This conclusion should be clear from the holding in *Lord v. Steamship Company, supra*, 102 U.S. 541, and *United Air Lines, Inc. v. Public Utilities Commission, supra*, 109 F.Supp. 13.

Any possible doubt was finally resolved by the United States Supreme Court in *United States v. California*, 381 U.S. 139 (1965). The California boundaries defined in that case are boundaries that control the state legislature as well as the federal government. This Court made its meaning abundantly clear in its rejection of California's position in that case:

> ". . . California may not use such base lines to *extend our international boundaries* beyond their traditional international limits against the expressed opposition of the United States. . . . But *an extension of state sovereignty to an international area by* claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow it must have the *power to prevent states from so enlarging themselves.*" (381 U.S. at 168; emphasis supplied.)

But California purports now to so enlarge itself by its decisions in this case and in *People v. Weeren*, 26 Cal.3d 654 (1980), also now before this Court on petition for certiorari.[6]

In both cases, the California courts pay mere lip service to this Court's clear rule in *U.S. v. California* and proceed to decisions in direct conflict with that rule.

Here, the court of appeal Opinion states that "we do not dispute that in its travel the S.S. Catalina travelled upon the

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[6]Docket No. 79-1978.

high seas" (at page 9), but then goes on to "distinguish":[7]

> "In both of the *United States v. California* cases, there existed the conflict in the operation or claims under the interpretation of what Congress intended to grant to the states by the Submerged Tidelands Act and the interpretation of the state's statutes defining the boundaries of the State of California. Additionally, the state in those cases was a party claiming broader statutory territory than the existing statutes clearly described. No such conflict is present here." (Opinion at 9-10.)

The California courts thus hold that they may extend the California boundary described in *U.S. v. California* under any circumstances where the effect does not produce a specific "conflict" with an "existing statute."

This is arrogance!

The California Supreme Court reached the same defiant result in *People v. Weeren, supra*, 26 Cal.3d 654, decided at a time between the state court of appeal Opinion and the supreme court denial of hearing in this case. There, the court affirmed the conviction (which had been reversed by the court of appeal) of fishermen for violations of the state Fish and Game Code occurring on the high seas between the mainland and offshore islands. The court concluded that the state constitution and statutes defining the seaward boundaries of California were void under *U.S. v. California* and that *U.S. v. California* "necessarily defined the state's inland waters for all *national* purposes" (emphasis supplied), but held that the state could constitutionally regulate the extraterritorial conduct of its citizens under the circumstances presented under the rule of *Skiriotes v. Florida*, 313 U.S. 69 (1941). In reply to the fisherman's argument that

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[7]381 U.S. 139 (1965), and 332 U.S. 804 (1947).

California law itself limited the application of such penal statutes to acts within California territory, the court "reasoned":

> "The completed violations in the case before us occurred well within the state boundaries as defined by our state Constitution and statutes. [Citations to sections admitted void under *U.S. v. California.*] These are the limits to which the Legislature implicitly intended to extend California's criminal laws. . . . As we have observed, California's territorial boundaries and, therefore, the extent of its criminal jurisdiction are restricted when they conflict with federal and international law. The factual record before us presents no such conflict."

Apparently, the California Supreme Court does not believe this Court's decisions to have the force of federal law. It is time to set things straight.

III.

The California Courts Have Here Held That Transportation of Interstate Passengers Is Not Itself Interstate Commerce Because There Are Not Enough Such Passengers.

Even if the transportation in this case were wholly within the state of California (which it is not), it would nevertheless be "interstate or foreign commerce" here because of the character of the passengers carried.

The rule first stated in *The Daniel Ball*, 10 Wall. 557 (1871), remains law:

> ". . . where passengers or goods travelling from one state to another are transported as part of that interstate journey by an agency which carries them solely within one state, the intrastate portion of the journey becomes interstate."

This principle was stated in terms of the shipment of goods in *United States v. Colorado & N.W.R. Co.*, 157 F. 321 (8th Cir. 1907):

> "Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another is a transaction of interstate commerce . . . *and every one who participates in it, who carries the goods through any part of their continuous passage, unavoidably engages in interstate commerce.*" (157 F. at 323; emphasis supplied.)

The same principle applies to the movement of passengers. *New York, New Haven & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128 (1953).

At all times in issue in this action, MGRS was engaged in rendering service to Santa Catalina Island for groups originating outside the State of California. These included *pre-paid* tours originating in Vancouver, British Columbia; New York City; Flagstaff, Arizona; Sonora, Mexico; Provo, Utah; Boston, Massachusetts; Las Vegas, Nevada; Albuquerque, New Mexico; Salt Lake City, Utah; Little Rock, Arkansas; Oceanside, New York; Houston, Texas, and so forth. (Stipulation, Par. 6; CT 10.)

In a case where the complete tour is prepaid and the tour originates out-of-state, the entire tour, including the local portion thereof, is included in interstate commerce. In *Southerland v. St. Croix Taxicab Association*, 315 F.2d 264 (3d Cir. 1963), the court held that "taxis" which transported passengers from the airport to their hotels, were engaged in interstate commerce where the taxi fare was pre-paid from out-of-state:

> "[T]he transportation of these individuals had been arranged for them and paid for in advance as an integral part of their all-expense interstate journey. Hence, it

> cannot, under these facts, be said that the service rendered by the plaintiff under his contract was distinct and separate from the interstate journey or that it was just another local fare." 315 F.2d at 269.

The present case comes within the rule of *Southerland* in that interstate passengers have planned their transportation to Catalina and have pre-paid for it as part of a continuous interstate journey, arranged in advance from their home states or countries. Even though these interstate passengers make up a small proportion of the company's business, under the rule of *The Daniel Ball*, their presence is sufficient to make the vessel one engaging in interstate commerce.

The court of appeal did not even mention, much less discuss, any of these authorities. Instead, the Opinion (at page 11) merely "dismissed as de minimis" these clear federal standards of interstate commerce.

Conclusion.

For each of the separate reasons set forth above, petitioner M.G.R.S. prays this Honorable Court issue its Writ of Certiorari herein.

Respectfully submitted,

JAMES H. LYONS,

J. TERENCE LYONS,

Attorneys for Petitioner
M.G.R.S., Inc.

APPENDIX.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

I have this day filed Order Apr. 30, 1980. HEARING DENIED.

In re: 2 Civ. No. 56238. M.G.R.S., Inc. vs. State Board of Equalization.

Respectfully,
Clerk

Decision of California Court of Appeal Reversing Trial Court.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

M.G.R.S., Inc., a California corporation, Plaintiff and Respondent, vs. California State Board of Equalization, Defendant and Appellant. 2 Civ. No. 56238. (Super.Ct No. C96419).

Filed: March 12, 1980.

APPEAL from a judgment of the Superior Court of Los Angeles County. William P. Hogoboom, Judge. Reversed with directions.

George Deukemejian, Attorney General, and Arthur C. DeGoede, Edmond B. Mamer, Philip C. Griffin, Lawrence K. Keethe, and Jeffrey M. Vesely, Deputy Attorneys General, for Defendant and Appellant.

James H. Lyons and J. Terence Lyons, for Plaintiff and Respondent.

NATURE OF APPEAL:

Appellant, State of California, through its State Board of Equalization (Board) appeals from the judgment of the Superior Court exempting respondent M.G.R.S., Inc. (MGRS) from payment of sales or use tax.

ISSUE:

The appeal presents the simple question: "Is the transportation of passengers upon the vessel 'S. S. Catalina' between the port of Los Angeles and the harbor of the City of Avalon on Catalina Island, both being points within the County of Los Angeles, interstate commerce within the meaning of Revenue and Taxation Code sections 6368 and 6368.1?"

OUR DECISION:

We hold that it is not and we reverse.

FACTS:

The parties submitted the case to the trial court upon a written stipulation of facts. MGRS is a California corporation whose business was limited to transportation of passengers between the Port of Los Angeles and Avalon on Catalina Island. The distance between the two points is approximately 26 miles. Both points are located within the County of Los Angeles and the State of California. The trip takes approximately two hours one way. MGRS was regulated solely by the California State Public Utilities Commission. No United States mail, interstate freight nor interline passengers were carried on the trip between the two points. On a few occasions, a minority of the passengers transported were part of group package tours paid for and operated by out-of-state travel agents. The Board imposed certain taxes under the Use and Sales Tax Law. MGRS paid under protest and thereafter sought recovery on the basis that its activity was excluded because it was engaged in interstate commerce and the law which otherwise imposed the tax on such business excluded those which were in interstate commerce.

THE STATUTORY PROVISIONS:

California imposes a Sales and Use Tax on the type of activity in which MGRS is engaged. ("California Use Tax Law", Rev. & Tax. Code, div. 2, part 1, §§6001, et seq.) Revenue and Taxation Code sections 6368 and 6368.1.,[1]

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[1]References hereafter to sections 6368 and 6368.1 are to the Revenue and Taxation Code.

specifically exempt receipts from the use or sales and lease for such use of water craft for use in Interstate or foreign commerce.

DISCUSSION:

The issue before us does not involve any question of the authority of the state or of Congress to regulate or otherwise legislate concerning respondent's activity. No federal law is being disputed. The California statute impinges on no federal legislation or regulation. The respondent does not dispute the power or authority of California to legislate in this field. Respondent instead asserts that it seeks to have enforced the law as written and to be excluded from the tax by reason of its claim that it, respondent, is engaged in interstate commerce. However, we conclude that under the facts at bench, respondent's contentions are reduced to the argument that respondent's activity could possibly be defined as being interstate commerce and therefore exempting respondent from the tax. The exemption, however, applies only to vessels which actually are engaged in or used in interstate commerce, not upon activity which could be so defined. The specific activity of respondent at the place where it occurred has not been declared interstate commerce by any state or federal statute. Nor has it been so defined by any California Supreme Court or appellate case or any United States Supreme Court decision.

Some cases relied upon by respondent at first blush seem to hold that similar conduct has been described as interstate commerce. Examination of such cases discloses totally dissimilar facts upon which they can be distinguished. More importantly, other California and United States Supreme

Court cases have demonstrated that this type of activity present at bench is not interstate commerce.

Relying upon language used in *Lord v. Goodall etc. S.Co.* (1880) 102 U.S. 541, respondent asserts that it is engaged in interstate or foreign commerce because its vessel the S.S. Catalina, like the vessel Ventura in *Lord*, traveled upon the "high seas", i.e. beyond the territorial or three-mile seaward limit of the State of California's shoreline. But *Lord* is of little comfort to respondent. In *Lord* the steamship Ventura transported passengers and cargo between San Francisco and San Diego. On one such voyage the vessel was lost. In affirming the applicability of the federal statute which limited liability, the United States Supreme Court stated that in its voyage the vessel traveled 480 miles and that the vessel went out of California and out of the United States as well, far out onto the Pacific Ocean. The court declared that the vessel entered on navigation which was "connected with other nations." It said, "In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress." (*Id.* at p. 544.)

However, the statement in *Lord* that the federal statute was applicable because the ship was engaged in interstate commerce and that this was because of its travel on the Pacific Ocean, was expressly rejected and repudiated and the case expressly disapproved on this ground in both the state Supreme Court and the United States Supreme Court opinions in the later case of *Wilmington T. Co. v. Railroad Commission* (1913) 166 Cal. 741, and in *Wilmington Transportation Company v. Railroad Commission of California* (1915) 236 U.S. 151, affirming the Supreme Court of California's decision in 166 Cal. 741. As explained in both decisions, *Lord* was not a case of determining the existence

of interstate commerce but instead involved the initial authority of Congress to enact legislation relative to and applicable to all ships in navigation, *i.e.* the right to limit liability under the maritime jurisdiction. There was present in *Lord* an act of Congress which applied to the activity involved. That activity was the loss at sea which caused the operation of the statute. Both the state and the United States Supreme Court decisions in *Wilmington* recognize that that part of the discussion in *Lord* concerning the existence of interstate commerce had earlier been renounced by the United States Supreme Court in *Lehigh Valley R. Co. v. Commonwealth of Pennsylvania* (1891) 145 U.S. 192, and in *Ex Parte Garnett* (1891) 141 U.S. 1, 12. As explained in *Garnett*, the maritime limited liability statute was applicable to vessels and ships in navigation whether engaged in interstate commerce or not. Such maritime laws apply to all vessels on all navigable waters whether the vessel is operating within or beyond the territorial waters of the state (*Butler v. Boston & Savannah Steamship Co.* (1888) 130 U.S. 527) and may be applicable or operate irrespective of the commerce clause or of the presence or absence of interstate commerce in the particular case. (*Moragne v. State Marine Lines* (1970) 398 U.S. 175.)

Respondent also relies on *Cornell Steamboat Co. v. United States* (1943) 321 U.S. 634. In defining interstate commerce for the purpose of commerce by water and the regulation thereof, the court in *Cornell* held that part of the Interstate Commerce Act regulating certain common carriers by water apply to vessels traveling between two points in the same state but which pass through the waters of another state. But present in *Cornell* were two features absent at bench. They are: (1) while en route between two points in New York, the voyage of the ship passed through the waters within the boundary of New Jersey, another state, and (2)

Congress had enacted legislation covering that very type of activity which the federal government sought to regulate. Moreover, the court expressly noted that such definition did not include certain types of cases involving transportation where the terminal points are located within the same state for the purpose of removing the activity from state taxation expressly citing *Wilmington Transportation Company v. Railroad Commission of California, supra*, 236 U.S. 151.

The facts at bench are different than in *Cornell*. As stipulated, in ferrying its passengers back and forth in this narrow channel, MGRS in no way contacted any activity of any other state or foreign country. By crossing the channel, respondent MGRS entered the territory of no other state, passed no other state or foreign country, nor entered the waters thereof. It carried no United States mail, interstate freight or interline passengers. It did nothing that required regulation by the federal government. It was not regulated by any federal, foreign or non-California governmental body. Comparing these facts to the facts in *Wilmington* is instructive. In *Wilmington* the state sought to control the rates charged for carrying passengers and cargo from San Pedro to Avalon, the same route and activity as present at bench. Holding that the activity was not exempt from state control on the claimed basis that it was interstate commerce and subject only to congressional control, the California Supreme Court said: "Vessels plying between San Pedro and Avalon cross the high seas for the sole purpose of getting from one point in Los Angeles County to another point in the same county. They do not touch at any other port, either of the United States or of any foreign country. They do not transfer their passengers or freight to any other vessel or receive the same from any other vessel in their course. They do not on the voyage take on or put off any article of commerce. While a portion of the voyage is on

the high seas, the navigation thereof is merely incidental to the real purpose of the voyage, which is to ply between two ports, both of which are located in the same county in this state." (*Wilmington T. Co. v. Railroad Commission, supra*, 166 Cal. 741, 743.)

In affirming and approving this decision, the Supreme Court of the United States agreed adding its language as follows:

> "We are not here dealing with the case of property which is in course of continuous transportation to another State or to a foreign country. [Citations.] It must be assumed upon this record that the State claims the right to exercise its authority only as to transportation between the mainland and the island and solely with respect to such shipments over this route as are local to the State, both as to the beginning and the end of the transportation. There is no passage through the territory of another State; the transportation, in its entire course, is subject to a single authority—either that of Congress or that of the State—and the latter would yield to the exercise of the former. The sovereignty of no other jurisdiction is encountered. It is plainly of importance to the people of the State that this local traffic should be carried upon reasonable terms; and if, in the case of a ferry, a State may protect its people from extortion although the ferriage is to the shore of another State, there is in our judgment no ground for saying that where the transportation is between two places in the same State it is less a subject for local action, in the absence of Federal interposition, because the voyage is over a stretch of open sea. Congress has not attempted to intervene, and we find no basis for the conclusion that the subject is one which must be deemed to be wholly free from regulation unless Congress deals with it. On the contrary, it is precisely of that local character which permits it to be left appro-

priately to the care of the State." (Emphasis added.) (*Id.* at p. 156.)

Both appellant and respondent devote much discussion to the issue of the territorial boundaries of California and whether or not the state has the power or authority to "regulate beyond its territorial jurisdiction." Respondent claims that the two related cases of *United States v. California* in (1947) U332 U.S. 19 and the subsequent decision in *United States v. California* (1965) 381 U.S. 139, are authority for the proposition that California cannot claim no exercise authority beyond the historic three-mile limit, parallel and seaward of its coastline because such area constitutes the high seas rather than the inland waters of the state. The holdings of these cases are irrelevant for our purposes here. The existence of the official territorial limits of California is relevant only to determine the fact that the vessel here does in fact travel upon high seas and beyond the inland waters of the state.

But as indicated before, there is no dispute and we do not dispute that in its travel the S.S. Catalina traveled upon the high seas. However, the activity in issue here was not subject to congressional regulation. The result is that respondent would claim that it is by definition presently under no authority or regulation by any jurisdiction. But nothing in the companion cases of *United States v. California, supra,* holds that the State of California may not impose a use tax on the activity simply because of the definition and determination of the territorial limits in those cases, which concerned the application of the Submerged Tidelands Act. The cases do not hold that all else beyond the territorial waters of California is necessarily interstate or foreign commerce. In both of the *United States v. California* cases, there existed the conflict in the operation or claims under the interpretation of what Congress intended to grant to the states by

the Submerged Tidelands Act and the interpretation of the state's statutes defining the boundaries of the State of California. Additionally, the state in those cases was a party claiming broader statutory territory than the existing statutes clearly described. No such conflict is present here. The state claims no territory or jurisdiction to control what occurs in or over the high seas per se. The state here has simply legitimately imposed a use tax not upon an interstate commercial activity but on the property or use thereof by a local corporation doing an entirely local business out of one local point in California where it has its principal place of business, San Pedro, and where that business involves no more than going to another point within the same county and state.

The authority and right to impose a tax free from the claim that by definition the activity is interstate commerce, is amply supported by *Wilmington Transportation Company v. Railroad Commission of California, supra*, 236 U.S. 151, and other cases rejecting the defense of interstate commerce. (*Alaska v. Arctic Maid* (1961) 366 U.S. 199)

Respondent also relies upon *United Air Lines v. Public Utilities Commission of Cal.* (1952) 109 F. Supp. 13 (S.D. Cal.). The federal trial court held that flights between Los Angeles International Airport and Santa Catalina Island were within the jurisdiction of the Federal Civil Aeronautics Board because the flights were over the high seas. The state claimed the right to regulate flights by requiring compliance with its local regulations. Respondent asserts that the case was reversed by the Supreme Court on "procedural grounds." Irrespective of respondent's characterization, the entire case was reversed in 346 U.S. 402, in its entirety. Thus there is no authority that transporting passengers by air from San Pedro to Catalina Island is interstate commerce which

thereby insulates that activity from control by the State of California.

In addition to the "high seas" argument, respondent claims that some of its passengers are passengers in interstate or foreign commerce. This is based on the stipulation that a minority of the total passengers on a minority of voyages were parts of group package tours paid for and operated by out-of-state travel agents. This argument may be dismissed as de minimis. In a suit for tax refund, the burden of proof rests upon the party seeking the refund. He must show not only that the tax assessment was in error but also prove sufficient facts upon which a correct assessment can be made. (*People v. Schwartz* (1947) 31 Cal.2d 59, 64-66; *Sunshine Art Studios of California, Inc. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 223, 230-231.) In order to qualify for the claimed exemption of section 3638, it was respondent's burden to prove that the principal use of the watercraft was transportation for hire in interstate or foreign commerce. A minority of the passengers on the minority of the trips (whatever that may mean), does not prove that the principal use of the vessel was in interstate commerce or that a principal use was in transporting such types of passengers. (*Union Oil Co. v. State Bd. of Equal.* (1963) 60 Cal.2d 441, 456-457.) To the contrary, it infers that on infrequent occasions some few passengers were sightseers or tourists from out of state. There is no proof of any interstate tourist business or negotiations therefor conducted by respondent. Neither is there any proof that respondent served as some sort of connecting passenger carrier between two interstate carriers. Admittedly, "there is no single concept of interstate commerce. . . ." (*McLeod v. Threlkeld, supra*, 319 U.S. 491, 495.) Also, we recognize that almost any local activity which may have only a remote and tenuous relationship with travel or other interstate commerce can be

said to affect interstate commerce, thus enabling Congress to regulate it in order to promote some publicly accepted and judicially recognized interest (e.g. see *Wickard v. Filburn* (1942) 317 U.S. 111.) But neither Congress nor the state have so classified respondent's activity. Until and unless Congress or the state so declare, the out-of-state tourist status of some few of its passengers does not truly change the local intrastate character of respondent's activity.

In summary, the respondent was not doing a business in interstate commerce among the several states or between one state and another or passing through waters of another state or foreign nation. It was not carrying on any substantial part of any interstate travel. Apart from making a claim that it was plying its trade upon the high seas, respondent cannot demonstrate that its activity was genuinely and substantially engaged in interstate or foreign commerce. Admittedly, the absence of congressional control does not necessarily prove the activity is not interstate commerce. On the other hand, as in the case at bench, the lack of any evidence of any federal regulation or control, and the lack of any evidence that the imposition of the sales and use tax in any way conflicts with any federal rule or regulation governing the activity of respondent, and the lack of any evidence that the activity in fact interferes with or substantially affects directly or indirectly the commerce of some sister state or foreign state or foreign nation, all strengthen the conclusion that respondent is not engaged in interstate or foreign commerce.

The judgment is reversed and the cause remanded to the superior court with instructions to enter judgment for appellant.

NOT FOR PUBLICATION.

/s/ Beach, *J.*

BEACH

We concur:

/s/ Fleming, *Acting P. J.*

FLEMING

/s/ Compton, *J.*

COMPTON

Minute Order.

Superior Court of California. County of Los Angeles. Dept. 1.

Date: Sept. 28, 1978.

Honorable: Wm. P. Hogoboom, Judge.

G. Hicks Deputy Sheriff.

B. Buckle, Deputy Clerk.

M.G.R.S., Inc., etc. vs. California State Board of Equalization. C 96 419.

Counsel for Plaintiff: James H. Lyons.

Counsel for Defendant: Evelle J. Younger, By: Lawrence K. Keethe.

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

In the above-entitled matter, heretofore submitted by this Court on June 28, 1978, the Court now rules as follows:

The Court finds that during the audit period, the operations of the S.S. Catalina by the plaintiff, M.G.R.S., Inc., a California Corporation, as described and set forth in the stipulation of facts, is a use of the vessel in interstate commerce as used in the Revenue and Taxation Code of the State of California, Sections 6368 and 6368.1 and that plaintiff, M.G.R.S., INC., A CALIFORNIA CORPORATION. is entitled to a refund of taxes as prayed against defendant, CALIFORNIA STATE BOARD OF EQUALIZATION.

Counsel for plaintiff to prepare findings of fact, conclusions of law and judgment.

Counsel of record mailed a copy of this minute order sent U.S. Mail this date.

Judgment.

Superior Court of the State of California, for the County of Los Angeles.

M.G.R.S., Inc., a California corporation, Plaintiff, v. California State Board of Equalization, Defendant. No. C 96419.

Filed: Nov. 14, 1978.

This case was submitted for decision on a Stipulation of Facts and written briefs on June 28, 1978 in Department 1 of the above-entitled Court, the Honorable William P. Hogoboom, Judge presiding, sitting without a jury, a jury having been duly waived. Plaintiff appeared by its attorney, James H. Lyons; defendant appeared by its attorney Evelle J. Younger, Attorney General, by Lawrence K. Keethe, Deputy Attorney General. Evidence, in the form of a Stipulation of Facts, having been presented by the parties, the cause having been argued in written briefs, oral argument, and subsequent letters directed to the Court by both plaintiff and defendant, and the case having been submitted for decision, and Findings of Fact and Conclusions of Law having been waived by stipulation of the parties,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. During the audit period, the operations of the S.S. Catalina by plaintiff M.G.R.S., Inc., as described and set forth in the Stipulation of Facts, is a use of the vessel in interstate and/or foreign commerce as used in Revenue and Taxation Code Sections 6368 and 6368.1, and plaintiff M.G.R.S., Inc. is therefore entitled to a refund of taxes from defendant California State Board of Equalization.

2. Plaintiff M.G.R.S., Inc. recover from defendant California State Board of Equalization the sum of $28,812.04, interest on said sum to the date hereof in the sum of

$9,4687.66, with plaintiff's costs and disbursements amounting to the sum of $....., together with interest on said judgment as provided by law.

The Clerk is ordered to enter the judgment.

Dated: November 14, 1978.

/s/ Hogoboom

Judge of the Superior Court

APPROVED AS TO FORM AND CONTENT:

EVELLE J. YOUNGER
Attorney General
PHILIP C. GRIFFIN
LAWRENCE K. KEETHE
Deputy Attorneys General

/s/ Lawrence K. Keethe
LAWRENCE K. KEETHE
Attorneys for Defendant
California State Board of Equalization

Stipulation Deeming Parties' Stipulation of Facts and Court Minute Order to the Findings of Fact and Conclusions of Law, and Said Stipulation of Facts.

In the Superior Court of the State of California for the County of Los Angeles.

M.G.R.S., Inc., a California corporation, Plaintiff, v. California State Board of Equalization, Defendant. No. C 96419.

Filed: Oct. 18, 1978.

IT IS HEREBY STIPULATED by and between plaintiff M.G.R.S., Inc. and defendant California State Board of Equalization, through their respective counsel of record herein, that the Findings of Fact and Conclusions of Law referred to in the Court's Minute Order of September 28, 1978 are waived, and that the Stipulation of Facts heretofore agreed to by the parties, filed with the Court and used by the Court in deciding this case, together with said Minute Order of September 28, 1978, may be used as the Findings of Fact and Conclusions of Law in this action.

Dated: October 13, 1978.

/s/ James H. Lyons
JAMES H. LYONS
Attorney for Plaintiff
M.G.R.S., Inc.

Dated: October 17, 1978.

EVELLE J. YOUNGER
Attorney General
PHILIP C. GRIFFIN
LAWRENCE K. KEETHE
Deputy Attorneys General

by /s/ Lawrence K. Keethe
LAWRENCE K. KEETHE
Attorneys for Defendant
California State Board
of Equalization
JUDGE OF THE SUPERIOR COURT

Stipulation of Facts.

Superior Court of the State of California, for the County of Los Angeles.

M.G.R.S., Inc. a California corporation, Plaintiff, vs. California State Board of Equalization, Defendant. No. C 96419.

Filed: Feb. 9, 1978.

IT IS HEREBY STIPULATED by and between plaintiff M.G.R.S., Inc., a California corporation (hereinafter called "MGRS") and defendant California State Board of Equalization (hereinafter called "Board"), through their respective counsel, that for the purposes of the herein action the following statements are true and undisputed, although not necessarily relevant, and may be treated by the Court as facts proven in open court.

1. At all times herein mentioned, MGRS was and is now a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles.

2. The Board is a duly constituted agency of the State of California charged with the administration of the Sales and Use Tax Law.

3. The California Attorney General has an office in the City of Los Angeles, County of Los Angeles, State of California.

4. The amount in controversy between MGRS and the Board concerns the period January 1, 1963 through December 31, 1970 (hereinafter called "audit period") to which all unspecified time references relate.

5. At all times mentioned herein, plaintiff was engaged in the transportation of passengers and their baggage for hire by vessel between the Port of the City of Los Angeles and the harbor of the City of Avalon on Santa Catalina Island pursuant solely to authority granted by the California Public Utilities Commission in Decision 59710 in Appli-

cation 41589, dated February 23, 1960, as subsequently amended.

6. The duration of the one-way voyage between the two points was approximately two hours and covered a distance of 26 miles. No United States mail, interstate freight on through arrangements between MGRS and other carriers) passengers were carried on the S.S. Catalina by MGRS. Some of the passengers transported were part of group package tours arranged, paid for and operated by out-of-state travel agents. These tours originated in the following locations, among others: Vancouver, British Columbia; New York City; Flagstaff, Arizona; Sonora, Mexico; Provo, Utah; Boston, Massachusetts; Las Vegas, Nevada; Albuquerque, New Mexico; Salt Lake City, Utah; Little Rock, Arkansas; Oceanside, New York; Houston, Texas. The passengers on such out-of-state package tours represent a minority of total passengers on a minority of voyages.

7. At all times mentioned herein, MGRS leased the S.S. Catalina, a watercraft, from the Catalina Transportation Co., a California corporation, under a bareboat charter agreement whereby MGRS was responsible for the purchase of parts and materials and for the repair and maintenance of the vessel. During the audit period MGRS made regular lease payments to Catalina Transportation Co. and purchased tangible personal property which became a component part of such watercraft in the course of further construction, repairing, cleaning, altering or improving the vessel, and paid charges for labor and services rendered in respect thereto. Such tangible personal property included, among other things, paint, valves, springs, ropes and bulkheads.

8. During the audit period MGRS did not have a permit from nor an account number with the Board and made no

payments under the provisions of the Sales and Use Tax Law with respect to either the bareboat charter lease payments or for the purchase of parts and materials in the repair and maintenance of the vessel, or for charges for labor or services rendered in respect thereto. MGRS purchased the tangible personal property ex-tax by furnishing its vendors with a watercraft exemption certificate at the time of sale.

9. On January 14, 1971, the Board issued to MGRS a report of a field audit covering the audit period. The report was based upon a review of the books and records of MGRS, including the general ledger, books of original entry, cash receipts and disbursements journal, purchase invoices and the lease agreements between MGRS and Catalina Transportation Co. The Board administratively determined that the operation of the S.S. Catalina by MGRS did not come within the exemption qualifying provisions of Revenue and Taxation Code Sections 6368 and 6368.1, and thus a tax was assessed measured by the bareboat charter lease payments in the amount of $274,847 and the cost of tangible personal property which became a component part of the S.S. Catalina in the course of repairing, cleaning, altering, and improving the same, and charges made for labor and services rendered in respect to such repairing, cleaning, altering, or improving, in the amount of $191,804.

10. On March 4, 1971, the Board issued to MGRS a notice of determination covering the audit period, a copy of which is attached hereto as Exhibit A and incorporated herein by reference.

11. On March 10, 1971, MGRS filed with the Board a petition for redetermination on the ground that the operation of the S.S. Catalina came within the exemption provisions of Revenue and Taxation Code Sections 6368 and 6368.1.

12. On March 9, 1972, a preliminary hearing on the petition was held before Board Hearing Officer Robert H. Anderson. On September 25, 1973, a formal hearing on the petition was held before the Board en banc.

13. On December 28, 1973, the Board issued to MGRS a notice of redetermination, a copy of which is attached hereto as Exhibit B and incorporated herein by reference.

14. On January 25, 1974, MGRS timely paid under protest to the Board the amount of $30,916.73 set forth in the notice of redetermination.

15. On March 15, 1974, MGRS timely filed with the Board under the provisions of Revenue and Taxation Code Section 6902 a claim for refund of the amount paid. It requested that the penalty portion of the assessment ($2,104.69) for failure to file tax returns be waived under Section 6592 and refunded on the ground that it was advised by its counsel and believed that it was exempt from the tax under Sections 6368 and 6368.1.

16. On May 1, 1974, the Board denied the claim for refund of MGRS in the amount of $28,812.04 and waived the penalty in the amount of $2,104.69. On June 21, 1974, the Board refunded the penalty to MGRS.

17. On August 8, 1974, MGRS timely filed this action pursuant to Revenue and Taxation Code Section 6933.

18. If the Court determines that the use of the S.S. Catalina by MGRS is "in interstate or foreign commerce" as those words are used in Revenue and Taxation Code Sections 6368 and 6368.1, MGRS is entitled to a refund in the amount of $28,812.04 plus interest thereon from January 25, 1974, as provided by Revenue and Taxation Code Section 6936. If the Court determines that the use of the S.S. Catalina by MGRS is not "in interstate or foreign

commerce'' as those words are used in Sections 6368 and 6368.1, MGRS is entitled to no amount of refund.

DATED: February 9, 1978.

EVELLE J. YOUNGER,
Attorney General
PHILIP C. GRIFFIN,
RODNEY LILYQUIST, JR.,
LAWRENCE KETHE,
Deputy Attorneys General

By /s/ Lawrence Kethe
LAWRENCE KETHE

Attorneys for Defendant,
California State Board of
Equalization

DATED: February 8, 1978.

/s/ James H. Lyons
JAMES H. LYONS

Attorney for Plaintiff
M.G.R.S., Inc.

State Board of Equalization
Department of Business Taxes
P.O. Box 1799
Sacramento, California 95808

M.G.R.S. Inc. P.O. Box 511, San Pedro, CA 90733.

DATE: December 28, 1973.

NOTICE OF REDETERMINATION

You are hereby notified that the action indicated below was taken on your petition for redetermination of Sales and Use Tax.

	AMOUNT			
	TAX	INTEREST	PENALTY	TOTAL
As Determined 1-1-63 to 12-31-70	21,046.95	4,187.27	2,104.69	27,338.91
Adjustment		3,577.82		3,577.82
As Redetermined	21,046.95	7,765.09	2,104.69	30,916.73

Monthly interest of 105.23 will accrue if not paid before 2-1-74.

Addtional penalty of 2,104.70 if not paid by 1-27-74.

The Board concluded that the movement of passengers and property by vessel from the California mainland to Santa Catalina Island and vice versa is not interstate or foreign commerce within the meaning of the term as used in Sections 6368 and 6368.1 of the Revenue and Taxation Code.

cc: James H. Lyons
611 West 6th Street
Suite 3450
Los Angeles, CA 90017

The Federal Question.

The federal question was first raised in this case in Petitioner's complaint in the state trial court, as set forth in the Statement of Facts above.

This question was expressly considered by the trial court:

> "THE COURT: I will give them [Sales Tax Counsel Rulings] as much weight as I possibly can but you know when it is a choice between the United States Supreme Court and the Sales Tax Council [sic, Counsel], I may feel under some compulsion to take rather lightly the Sales Tax Council [sic, Counsel].
>
> "MR. KEETHE [Counsel for the Board]: I think *United States v. California* would be one of the cases Your Honor should look to." (Reporter's Transcript at 16.)

and ruled upon:

> " . . . the operations of the S.S. Catalina by planitiff M.G.R.S., Inc., as described and set forth in the stipulation of facts, is a use of the vessel in interstate and for foreign commerce . . . " (Judgment, CT 98; Appendix page A-20.)

The same issue was raised by MGRS in its brief before the court of appeal (e.g., Statement of Issues Presented, Respondent's Brief at page 6; Petition for Rehearing at pages 6 ff.), and in its Petition for Hearing to the California Supreme Court at, for example, pages 2-3:

> "The sole issue presented to the superior court, and to the Court of Appeal, is:
>
> Whether the operation of the vessel 'S.S. Catalina' by MGRS between the California mainland and Santa Catalina Island, *and* involving the transportation of otherwise interstate passengers, is or is not 'interstate or foreign commerce' and therefore exempt from the California sales and use tax by virtue of the provisions of sections 6368 and 6368.1 of the Revenue and Tax-

ation Code.

"The position of MGRS, and the judgment of the superior court, is based upon the syllogism (1) that transportation between two points in the same state through waters outside that state constitutes 'interstate or foreign commerce' as a matter of federal law binding upon the states, (2) that transportation between the Port of Los Angeles and Santa Catalina Island involves leaving the State of California and travelling 20 miles of high seas before re-entering California, and therefore (3) that such transportation is within the exemption for 'interstate or foreign commerce' which the Legislature has chosen to create in sections 6368 and 6368.1 of the Revenue and Taxation Code.

"Further, as an independent basis for its claim and for the superior court's judgment, MGRS argues that persons transported by MGRS are themselves in interstate or foreign commerce, and the transportation conducted by MGRS therefore assumes this character as a matter of controlling federal law.

"The Opinion of the Court of Appeal recognizes that the subject voyage leaves California and travels upon the high seas before re-entering the state (Opinion at pages 9, 11, and 12), but refuses to recognize that such transportation is 'interstate or foreign commerce' as a matter of law.

"With respect to the interstate character of some of MGRS's passengers, the Opinion ignores established rules of federal constitutional interpretation and merely asserts—without authority—that the 'argument may be dismissed as de minimus.' (Opinion at 13.)"

Throughout the entire life of this litigation, both parties and all courts have relied upon their respective interpreta

tions of this Court's decisions in claiming support for their respective arguments and decisions.

Petitioner now prays that this court stop California from redefining "interstate or foreign commerce" contrary to federal law, and from extending not only its own boundaries but those of the United States into the international sea.